PD-0635-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/24/2019 2:22 PM
Accepted 12/27/2019 9:51 AM
DEANA WILLIAMSON
CLERK

NO. PD-0635-19

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
12/27/2019
DEANA WILLIAMSON, CLERK

JAMES RAY HAGGARD

VS.

THE STATE OF TEXAS

**ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
NINTH JUDICIAL DISTRICT OF TEXAS
AT BEAUMONT
CAUSE NOS. 09-17-00319-CR & 09-17-00320-CR**

**Appealed from the
75th District Court of Liberty County, Texas
Cause Number CR30744**

APPELLANT'S REPLY BRIEF

**Josh Schaffer
State Bar No. 24037439**

**1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com**

**Attorney for Appellant
JAMES RAY HAGGARD**

ORAL ARGUMENT GRANTED

SUBJECT INDEX

Page

REPLY ISSUE ONE 1

THE STATE'S BRIEF FAILS TO ADDRESS WHETHER THERE WAS AN "IMPORTANT PUBLIC POLICY" JUSTIFICATION FOR THE TRIAL COURT'S DECISION TO PERMIT THE WITNESS TO TESTIFY REMOTELY BY VIDEOCONFERENCE.

REPLY ISSUE TWO 3

THE STATE'S BRIEF FAILS TO ADDRESS THE SUPREME COURT'S CONTROLLING PRECEDENT ON HARM ANALYSIS.

CONCLUSION..... 5

CERTIFICATE OF SERVICE..... 5

CERTIFICATE OF COMPLIANCE 6

INDEX OF AUTHORITIES

Cases	Page
Acevedo v. State, 2009 WL 3353625 (Tex. App.—Dallas 2009, pet. ref'd)	2
Bush v. State, 193 P.3d 203 (Wyo. 2008)	2
Chapman v. California, 386 U.S. 18 (1967)	4
Coronado v. State, 351 S.W.3d 315 (Tex. Crim. App. 2011)	3
Coy v. Iowa, 487 U.S. 1012 (1988)	1,4
Crawford v. Washington, 541 U.S. 36 (2004)	3
Danner v. Kentucky, 525 U.S. 1010 (1998)	3
Fahy v. Connecticut, 375 U.S. 85 (1963)	3
Gonzalez v. State, 818 S.W.2d 756 (Tex. Crim. App. 1991)	2
Harrell v. State, 709 So.2d 1364 (Fla. 1998)	2
Lara v. State, 2018 WL 3434547 (Tex. App.—Dallas 2018, pet. ref'd)	2
Marx v. State, 987 S.W.2d 577 (Tex. Crim. App. 1997)	2
Marx v. Texas, 528 U.S. 1034 (1999)	3
Maryland v. Craig, 497 U.S. 836 (1990)	1
Paul v. State, 419 S.W.3d 446 (Tex. App.—Tyler 2012, pet. ref'd)	2
People v. Cintron, 551 N.E.2d 56 (N.Y. 1990)	2
People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009)	2
Rivera v. State, 381 S.W.3d 710 (Tex. App.—Beaumont 2012, pet. ref'd)	2

Page

Stevens v. State, 234 S.W.3d 748 (Tex. App.—Fort Worth 2007, no pet.) 2

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) 2

United States v. Rouse, 111 F.3d 561 (8th Cir. 1997) 2

Rule

TEX. R. APP. P. 44.2(a) 4

REPLY ISSUE ONE

THE STATE'S BRIEF FAILS TO ADDRESS WHETHER THERE WAS AN "IMPORTANT PUBLIC POLICY" JUSTIFICATION FOR THE TRIAL COURT'S DECISION TO PERMIT THE WITNESS TO TESTIFY REMOTELY BY VIDEOCONFERENCE.

In pages 14 through 51 of its brief, the State cites numerous Supreme Court and lower court cases that, boiled down to their essence, stand for a simple, undisputed proposition: the remote testimony of a prosecution witness by videoconference violates the Confrontation Clause ***unless*** there is an "important public policy" justification. Maryland v. Craig, 497 U.S. 836, 845, 850 (1990) (quoting Coy v. Iowa, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring)). Craig, the leading Supreme Court case, held that public policy permitted an emotionally fragile child sexual abuse complainant to testify by closed-circuit television and overcame the constitutional requirement that a prosecution witness testify in person in court. Craig, 497 U.S. at 855.

Lower courts in Texas and elsewhere have applied Craig's holding not only to child sexual abuse complainants but also to other types of prosecution witnesses whose physical absence from the courtroom was justified by an "important public policy." The State's brief collects these cases. In ***every single case*** cited by the State, courts found that an important public policy justified the witness's physical absence from the courtroom—ranging from serious health issues and advanced age

to being in a foreign country (and not subject to subpoena power).[1] Significantly, the State does not cite any case in which a court held that an important public policy justified allowing remote testimony based only on the inconvenience to a healthy adult witness located in the United States. That is, of course, because no such case exits. Appellant's case would be the first should this Court affirm his conviction.

Rather than try to explain how appellant's case squares with the post-Craig cases, the State asks this Court to craft a bright-line rule that ***any*** prosecution witness may testify remotely by videoconference—even when no important public policy justifies her physical absence from the courtroom. The State offers no limiting principle. If the trial court did not err in appellant's case, then could ***all*** prosecution witnesses testify remotely? Importantly, the State ignores the Supreme Court's clear limiting principle in Craig that requires an "important public policy" justification. This Court must reject the State's invitation to ignore binding Supreme Court precedent. See Harrell v. State, 709 So.2d 1364, 1368 (Fla. 1998) ("We are

[1] Lara v. State, 2018 WL 3434547 (Tex. App.—Dallas 2018, pet. ref'd) (witness recently suffered heart attack); Paul v. State, 419 S.W.3d 446 (Tex. App.—Tyler 2012, pet. ref'd) (witness with ovarian cancer undergoing chemotherapy); Rivera v. State, 381 S.W.3d 710 (Tex. App.—Beaumont 2012, pet. ref'd) (witness in military on active duty in Iraq); Acevedo v. State, 2009 WL 3353625 (Tex. App.—Dallas 2009, pet. ref'd) (witness experiencing high-risk pregnancy); People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009) (elderly, ill witness); Bush v. State, 193 P.3d 203 (Wyo. 2008) (seriously ill witness); Stevens v. State, 234 S.W.3d 748 (Tex. App.—Fort Worth 2007, no pet.) (seriously ill witness); United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) (seriously ill witness); Harrell v. State, 709 So.2d 1364 (Fla. 1998) (witnesses located in foreign country; one was ill); Marx v. State, 987 S.W.2d 577 (Tex. Crim. App. 1997) (child sexual abuse complainant); United States v. Rouse, 111 F.3d 561 (8th Cir. 1997) (child sexual abuse complainant); Gonzalez v. State, 818 S.W.2d 756 (Tex. Crim. App. 1991); People v. Cintron, 551 N.E.2d 56 (N.Y. 1990) (child sex abuse complainant).

unwilling to develop a *per se* rule that would allow the vital fabric of physical presence in the trial process to be replaced at any time by an image on a screen.").

This Court need not further address the issue to rule for appellant because the trial court's ruling was contrary to Craig. Nevertheless, appellant notes that this Court recognized in 2011 that Craig is fundamentally inconsistent with the Supreme Court's subsequent decision in Crawford v. Washington, 541 U.S. 36 (2004).[2] Applying Crawford's categorical approach to the Confrontation Clause to appellant's case would require this Court to find a Confrontation Clause violation.

REPLY ISSUE TWO

THE STATE'S BRIEF FAILS TO ADDRESS THE SUPREME COURT'S CONTROLLING PRECEDENT ON HARM ANALYSIS.

The State's brief not only ignores the Supreme Court's Confrontation Clause requirements but also fails to address its binding precedent on harm analysis. See Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) (in assessing whether constitutional

[2] Coronado v. State, 351 S.W.3d 315, 321 (Tex. Crim. App. 2011) ("The Supreme Court has never overturned the holding in Craig, but, beginning with Crawford v. Washington, the Supreme Court has nibbled it into Swiss cheese by repeating the categorical nature of the right to confrontation in every one of its more recent cases."); see also Danner v. Kentucky, 525 U.S. 1010, 1010 (1998) (Scalia, J., joined by Thomas, J., dissenting from denial of certiorari) (in pre-Crawford dissenting opinion, Justice Scalia, who authored Crawford majority opinion, commented: "I believe Craig was wrongly decided, since the confrontation guaranteed by the Sixth Amendment covers all witnesses in (as the text says) 'all criminal prosecutions.'"); Marx v. Texas, 528 U.S. 1034, 1034 (1999) (Scalia, J., joined by Thomas, J., dissenting from denial of certiorari) ("I dissented in Craig, because I thought it subordinated the plain language of the Bill of Rights to the 'tide of prevailing current opinion.' . . . . I do not think the Court should ever depart from the plain meaning of the Bill of Rights.").

error was harmless: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of."); Coy, 487 U.S. at 1021-22 ("An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence.").

Applying these cases to the Confrontation Clause violation here, this Court cannot conclude that Suzanne Devore's testimony was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967), and Texas Rule of Appellate Procedure 44.2(a). Devore was an essential link in the State's chain of custody for the DNA evidence, which was critical to the State's case. Without her testimony, the State could not have admitted evidence that appellant's DNA allegedly was found on the complainant's breast. Moreover, Devore also was an important fact witness who testified about the complainant's prior consistent statement made during the SANE exam. Without Devore's testimony—which also would have resulted in the exclusion of the DNA evidence—the jury likely would not have convicted appellant, particularly in view of the complainant's serious credibility problems. See Appellant's Brief at 2, 5-6, 22, 24. Therefore, the Confrontation Clause violation was not harmless beyond a reasonable doubt under

Fahy, Coy, and Chapman.

CONCLUSION

The Court should reverse the judgment of conviction and remand for a new trial.

Respectfully submitted,

/S/ *Josh Schaffer*
Josh Schaffer
State Bar No. 24037439

1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
JAMES RAY HAGGARD

CERTIFICATE OF SERVICE

I served a copy of this document on Stephen C. Taylor, assistant district attorney for Liberty County, and on Stacey M. Soule, State Prosecuting Attorney, by electronic service and electronic mail on December 24, 2019.

/S/ *Josh Schaffer*
Josh Schaffer

CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 1,173 words. This document complies with the typeface requirements of Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

/S/ *Josh Schaffer*
Josh Schaffer